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No. 75-866

Supreme Court, U. S.
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In the
Supreme Court of the United States
October Term, 1975

M.J.D.M. TRUCK RENTALS, INC., and
WILLIAM V. DEMAIO,

Petitioners,

vs.

WILLIAM J. O'BRIEN,

Respondent.

REPLY BRIEF TO ARGUMENTS FIRST RAISED IN BRIEF FOR RESPONDENT IN OPPOSITION

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1. PETITIONER'S REPLY TO ARGUMENT OF RESPONDENT RESPECTING THE FINALITY OF A FEDERAL JUDGMENT.

William J. O'Brien, Respondent herein, makes the conclusory statement that the decision appealed from involves only Illinois law and "that no amount of strained interpretation can convert this into a substantial federal question" (Brief in Opp. p. 3). Respondent completely ignores the key finding of the August 26, 1975 *Stevens* Opinion, "thus, the June 3 Judgment became interlocutory upon the filing of the new trial motion on June 12" (Pet. for Cert. p. 5a, fn. 5).

This finding, respecting the conversion of a final federal judgment into an interlocutory judgment upon the mere filing of a post trial motion, is unquestionably a federal issue going to the very essence of federal litigation.

2. PETITIONER'S REPLY TO ARGUMENT OF RESPONDENT THAT THERE IS NO CONFLICT WITHIN THE 7TH CIRCUIT COURT OF APPEALS RESPECTING THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY LOCATED IN ILLINOIS UNDER ILLINOIS LAW.

Respondent interprets the 1967 *Cummings* opinion as holding "that the bankruptcy laws prevented MJDM from perfecting a judgment lien against the property" . . . (Brief in Opp. p. 4).

The 1967 *Cummings* opinion did not hold that the bankruptcy laws prevented MJDM from perfecting a judgment lien against the property, but determined the priority of liens, holding that the lien of the Trustee in Bankruptcy was valid as of December 9, 1964, and MJDM's lien, being perfected thereafter, was null and void as against the Trustee. (Pet. for Cert. p. 11a, 13a).

The 1967 *Cummings* opinion "that MJDM's remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of the judgment" (Pet. for Cert. p. 13a) makes it clear that a federal judgment lien *was* perfected on March 12, 1965 when MJDM's judgment was recorded, and that no law existed affecting the finality of the June 3, 1964 judgment which would have prevented it, upon recording, from perfecting a federal judgment lien at any time between June 3, 1964 and the bankruptcy proceedings.

The *Stevens* opinion that "it follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy" (Pet. for Cert. p. 6a) is in direct conflict with the *Cummings* opinion.

3. PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT THAT THE COURT OF APPEALS HAS CORRECTLY DECIDED AN IMPORTANT STATE QUESTION RESPECTING THE CREATION OF A FEDERAL JUDGMENT LIEN ON REAL PROPERTY IN ILLINOIS.

In support of the argument that MJDM's judgment was not "final and executable", as a matter of Illinois law, respondent cites the following cases: *Noe* v. *Moutray,* 170 Ill. 169, 177, 48 N.E. 709, 712 (1897); *City of Chicago* v. *Hall,* 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell,* 298 Ill. App. 434, 440, 90 N.E. 2d 111, 114 (1939). (Brief in Opp. p. 4)

Noe v. *Moutray,* involved an individual who had executed a deed of conveyance of real property nine years prior to his death. The grantees of the deed did not record the deed during the lifetime of the grantor, but waited until approximately 6 months after the grantor's death intestate. After the grantor's death but before the grantees had recorded the deed, the Probate Court had allowed several creditors' claims against the decedent's estate.

The issue before the court was whether or not a creditor's claim allowed against a decedent's estate by the probate court created a lien on the decedent's real estate within the meaning of the Illinois Recording Act so as to entitle the probate claimants to a priority as against the grantees of the unrecorded deed, executed by the deceased in his lifetime and remaining unrecorded at the time of the allowance of the probate claim.

The Court held that claims allowed against the decedent's estate by the probate court were not judgments within the meaning of the Illinois Recording Act upon which a lien could be created, which is not relevant to the issue at bar.

The Court stated at p. 712:

> A valid judgment, in order to create a lien, must possess two qualifications: First, it must be final and for a definite sum; and, second, it must be such a judgment that execution may issue thereon. 12 Am. & Eng. Enc. Law, p. 104; 1 Black, Judgm. sections 407, 408; *Mitchell* v. *Mayo, supra;* Rev. Stat. Ill. c. 77, sec. 1. A judgment or claim allowed against an estate is not final or definite in amount, so far as the real estate is concerned, for two reasons. In the first place, the exact amount of it to be paid by a sale of the real estate cannot be definitely ascertained until the personal estate of the decedent is exhausted.
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> In the second place, the heirs are not bound by such judgment. When a petition is filed by an administrator to sell the land for the payment of the claims allowed against the estate, the heirs and devisees are required, under the statute, to be made parties. Their interest cannot be affected by the judgment rendered against the administrator without notice to them. They have the right to come into court, and question and disprove the items included in or constituting such a judgment, if they can. In the proceeding to sell the land, they may set up any defenses which they had no opportunity to set up when such judgment was obtained, and consequently it is not final as to the heirs when originally allowed against the estate.
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> Such a judgment against an estate lacks the second qualification above referred to, because execution cannot issue upon it. If the judgments against Joseph

> Johnson had been rendered in his lifetime, the holders of them, having no notice, at the time of their rendition, of the unrecorded deed above described, would be entitled to enforce them as prior liens against his lands ahead of the rights of the grantees in such deed. But the creditors here obtained the allowance of their claims against the estate of Joseph Johnson after his death, and after he had in his lifetime conveyed away the land in question. They have no more right to priority over the grantees in the deed unrecorded than if it had been recorded.

MJDM's federal judgment was a final judgment within the meaning of *Noe* in that the exact amount was definitely ascertained to be $107,587.06 reduced by remittitur to $60,261.77.

MJDM's judgment did possess the qualification of executability as in *Noe,* in that Hamilton Steel Products, Inc. was an existing legal entity, with notice, on the date of rendition of the judgment and the judgment was immediately "executable" at any time prior to the bankruptcy proceedings.

City of Chicago v. *Hall* involves a creditor's claim to a prior lien against other creditors by reason of having first commenced a suit at law before other creditors had instituted any suits at law or chancery. The court held at p. 348:

> "Under the laws of this state, the mere institution of a suit does not create a lien on anything. It is the final judgment or decree that creates a lien."

Lehman v. *Cottrell* is a case involving a conflict between the Illinois Homestead Exemption Statute and the Illinois Statute creating judgment liens.

In holding that the Homestead Statute specifically created an exemption from the lien of a judgment, the court stated:

> At common law, land was subject neither to execution nor to the lien of a judgment. Both these results are purely statutory. The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. Hence, where the right of sale cannot be asserted, the existence of the lien must be denied. Freeman on Judgments (3d Ed.) ch. 14, secs. 339, 340, 355; Freeman on Executions, Para. 249, p. 388. It would follow as a logical result from the application of this general principle that a judgment rendered after the creation and during the existence of a homestead cannot be a lien thereon.

This analysis of the cases cited by Respondent shows that none of them support his position that, under Illinois law, MJDM's June 3, 1964 federal judgment was not "final and executable" on the date it was rendered.

In further support of Respondent's argument that MJDM's judgment was not "final and executable" on June 3, 1964, Respondent relies on 1 *Black on Judgments,* sec. 407 (1902) wherein the following requirements are stated as being necessary to the creation of a judgment lien: (1) a judgment capable of collection by execution, (2) a judgment rendered by a lawful and validly constituted court, (3) a valid and subsisting judgment, and (4) a judgment for a definite and certain sum of money.

All of these elements were present on June 3, 1964, the date of entry of MJDM's judgment and so remained, notwithstanding the stay of execution order nor the filing of the new trial motion.

Respondent further cites 2 Freeman on Judgments, sections 929, 930 (1925) to support the proposition that MJDM's June 3, 1964 judgment was not "final and executable."

Section 929 of Freeman states that the nature of a judgment to create a lien must be one that is (1) final as distinguished from interlocutory (2) it must create a definite personal liability which is immediately enforceable, and (3) it must be for a definite specified sum.

In Section 930, Freeman states:

> As heretofore stated, a lien of judgment is a consequence of the *right* to sell real estate for its satisfaction, and when that right is conceded, the existence of the lien is generally admitted, and whenever that right is denied, the existence of the lien is also denied, even under a statute making judgments a lien upon all the property of the debtor both real and personal. Decrees for a definite sum of money and *capable* of being enforced by execution, are therefore liens upon real estate. But judgments upon which no execution may issue, as judgments against a state or municipal corporation, create no liens, and judgments upon which the *right* to issue execution has terminated, cease to be liens. (emphasis added.)

It cannot be said that MJDM's right to sell Hamilton's real estate in satisfaction of its June 3, 1964 federal judgment did not exist on June 3, 1964 because of the stay of execution order. A stay of execution order is based upon the existence of the right of execution.

Section 994, Freeman on Judgments, more clearly states the precise issue of the instant case:

> If when a judgment is entered, or afterwards, the court directs that execution be stayed for a time specified, this does not in any way affect the lien

of the judgment, nor prevent it from attaching at once and continuing during the period in which the right to enforce the judgment is suspended.

CONCLUSION

It is respectfully submitted that the instant case involves principles of sound judicial discretion which this court should not ignore, but review on writ of certiorari.

Respectfully submitted,

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